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AGENDA

BOARD OF ENVIRONMENTAL REVIEW

FRIDAY, JULY 29, 2005

METCALF BUILDING, CONFERENCE ROOM 111

1520 EAST SIXTH AVENUE, HELENA, MONTANA

NOTE: Individual agenda items are not assigned specific times. For public notice purposes, the Board will begin the meeting at the time specified. However, the Board might not address the specific agenda items in the order they are scheduled.

9:00 A.M.

I. ADMINISTRATIVE AGENDA ITEMS

- A. Review and approve minutes of June 3, 2005, meeting.

Draft Minutes

II. BRIEFING AGENDA ITEMS

A. CONTESTED CASE UPDATE:

1. Cases assigned to Hearing Officer Tom Bowe

- a. **In the matter of CR Kendall Corporation's request for a hearing to appeal DEQ's decision to deny a minor permit amendment under the Metal Mine Reclamation Act (BER 2002-09 MM).** CR Kendall and DEQ have jointly requested additional time to submit a proposed schedule. The Hearing Examiner has granted the requests.
- b. **In the matter of the Petition for Review of Hazardous Waste Final Permit No. MTHWP-03-01 issued to Flying J Petroleums, Inc. (BER 2003-14 HW).** Flying J has requested a hearing under the Montana Hazardous Waste Act to review the final decision of DEQ to issue a Hazardous Waste Final Permit to Flying J for its former refinery located near Cut Bank. Counsel for the parties stipulated to a stay of contested case proceedings while they discussed the terms of an order that could resolve this case. However, the case was not settled and the parties proposed a schedule for contested case proceedings. On April 5, 2005, the Hearing Examiner issued a scheduling order. The final prehearing conference was set for January 10, 2006.
- c. **In the matter of Violations of the Montana Water Quality Act by the City of Lewistown Wastewater Treatment Plant (BER 2004-15 WQ).** On October 20, 2004, the Board received a letter from the City Manager of Lewistown appealing \$11,608 in administrative penalties for violations of the Water Quality Act. On September 21, 2004, DEQ had issued an Administrative Penalty Order for six discharges of sewage into Big Spring Creek. The parties proposed a schedule for contested case proceedings on March 1, 2005, and the Hearing Examiner issued a scheduling order. The final prehearing conference was set for October 12, 2005.
- d. **In the matter of Violations of the Montana Public Water Supply Laws by Darwin Simac d/b/a Jackson Creek Saloon, Montana City, Jefferson County (BER 2005-05 PWS).** The Board received a request for hearing on January 31, 2005, regarding a Notice of Violation and Administrative Compliance and Penalty Order for various

violations of the Montana Public Water Supply Laws. The parties agreed on a schedule. Under the scheduling order, the hearing is set to begin on August 23, 2005.

- e. **In the Matter of Violations of the Montana Water Quality Act by Bar S Livestock, Inc., Toole County, Montana (BER-2005-06 WQ).** Bar S Livestock, Inc. requested a hearing on the Notice of Violation and Administrative Compliance and Penalty Order issued by DEQ relating to the alleged failure of Bar S Livestock, Inc. to comply with the requirements of the general permit for the CAFO it operates near Shelby. The parties agreed on a schedule. Under the scheduling order the hearing is set to begin on October 5, 2005.
- f. **In the matter of Violations of the Water Quality Act by ASARCO, Inc., (BER 2005-09 WQ).** The Board received a request for hearing regarding an Administrative Penalty Order issued by DEQ for the alleged failure to pay annual permit fees on the MGWPCS permit for discharges from the Paymaster Mine Adit located in Lewis and Clark County. DEQ claims ASARCO should have paid permit fees for a permit that ASARCO argues should have been terminated in 2002. The parties requested until July 19, 2005 to submit a schedule or settlement papers and the Hearing Examiner granted the request.
- g. **In the matter of Violations of the Opencut Mining Act by Kenneth Mikesell, d/b/a Mikesell Gravel Mine, Meagher County (BER 2005-10 OC).** DEQ issued a notice of violation, statement of proposed penalty, and cessation and abatement order. In 1980, a permit was issued for an opencut gravel mine that would disturb 4 acres. An inspection in 2002 found about 20 acres of surface had been disturbed. Despite repeated requests, Mr. Mikesell did not submit an application to amend the permit and an additional bond, and was ordered to cease mining outside the 4-acre permitted area. Under the scheduling order, the final prehearing conference was set for October 3, 2005.
- h. **In the matter of the application by Patty Irvine, d/b/a Marks Environmental Service, for renewal of septage disposal license (BER 2005-11 SW).** DEQ denied license renewal by order dated March 29, 2005. The renewal was denied because the business is not being operated in compliance with septage disposal laws and rules. Alleged violations included the failure to maintain records, disposing of septage on land without first obtaining the written approval of the landowner and DEQ, and disposing of septage without a license. Under the scheduling order, the final prehearing conference was set for September 28, 2005.
- i. **In the matter of the notice of Violation of the Opencut Mining Act by Mickelson Rock Products, LLC at the Tricon Pit #2, Mineral County (BER 2005-12 OC).** DEQ issued a notice of violation and statement of proposed penalty for mining without a permit. Under the scheduling order, the hearing will probably be held in December 2005.
- j. **In the matter of Violations of the Montana Operator Certification and Public Water Supply Laws by Richard Kelly at the Ten Mile-Pleasant Valley Lagoons, Lewis and Clark County (BER 2005-13 PWS).** The Board received a request for hearing on May 17, 2005, regarding the Notice of Violation and Administrative Compliance and Penalty Order issued by DEQ for the operation of a public sewage system without a certified operator. Under the scheduling order, the final prehearing conference was set for November 7, 2005.

B. OTHER BRIEFING ITEMS

1. FAQs Update – The Board will be briefed on the status of updating the Board FAQs on the Web.

Revised Frequently Asked Questions

III. ACTION AGENDA ITEMS

A. NPRC PETITION FOR RULEMAKING

On May 17, 2005, the Board received a 70-page petition from 17 entities, including Northern Plains Resource Council and Tongue & Yellowstone Irrigation District. The petition contains two components: (1) proposed adoption of new rules pertaining to treatment requirements for water from Coal Bed Methane (CBM) development; and (2) proposed amendment of ARM 17.30.670 pertaining to nondegradation requirements for electrical conductivity (EC) and sodium adsorption ratio (SAR), flow-based permitting, and the non-severability of these provisions. The Board received comments about the petition at its public meeting on June 3, 2005. The Petitioners agreed to extend the time for the Board to make its decision on the Petition until the meeting on July 29, 2005. Under Mont. Code Ann. Sec. 2-4-315 and Model Rule 2, the Board will hear presentations by the petitioners and other interested persons regarding whether the Board should deny the petition or initiate rulemaking. Under Mont. Code Ann. Sec. 2-4-315, the Board's decision to deny the petition or to initiate rulemaking must be in writing and based on record evidence.

Executive Summary

Notice of Public Hearing on Proposed Amendment and Adoption

Water Pollution Control Advisory Board Comment

Pinnacle Gas Resources Comments

Fidelity Exploration and Production Company Submittals

Comments Letter

Analysis of Petition

Tom Osborne, HydroSolutions Inc. Draft Testimony

Schafer Ltd. Analysis of Water Quality

PowerPoint Presentation

Petroleum Association of Wyoming Technical Review and Analysis

B. FINAL ACTION ON APPEALS

1. **In the matter of the request for hearing of Nature View Estates, Missoula County, under Mont. Code Ann. § 76-4-126 (BER 2004-16 SUB).** On November 3, 2004, the Board received a letter from the law firm representing the subdivision applicants, Jeff and Kori Hollenback. By letter dated October 4, 2004, the Missoula City-County Health Department stated that the subdivision couldn't be approved because of water supply deficiencies. The parties have filed a Stipulation for Dismissal stating that the parties have reached a settlement. A proposed order dismissing the case will be presented to the Board for approval.
2. **In the matter of Violation of the Montana Strip and Underground Mine Reclamation Act by Westmoreland Resources, Inc. at the Absaloka Mine, Big Horn County (BER 2005-01 SM).** Request for hearing was received on January 3, 2005, on a

Notice of Violation and Statement of Proposed Penalty dated December 13, 2004. The Department contends that Westmoreland (WRI) failed to regrade to the approved postmining topography and assessed a penalty of \$800 for the violation. By letter dated January 31, 2005, DEQ gave notice to the Crow Coal Regulatory Program of the case. The Tribe did not file a motion to intervene. The parties have stipulated to suspension of the abatement order as long as there is no immediate danger to health or safety. Prehearing conferences were conducted on May 18 and June 15, 2005, and the parties requested more time to attempt to reach a settlement. July 6, 2005, was set as the date to submit settlement papers or a proposed schedule for further proceedings. On July 6, the Board received a stipulation to dismiss the case. A proposed order to dismiss the case will be presented for Board approval.

C. NEW CONTESTED CASES

1. **In the matter of Violations of the Opencut Mining Act by Century Companies, Inc. at the Bergh Pit, Plentywood, Sheridan County (BER 2005-14 OC).** Request for hearing was received on June 14, 2005, on a Notice of Violation and Statement of Proposed Penalty relating to the alleged failure to complete reclamation on time. The parties requested until August 23, 2005, to pursue settlement. Standing Interim Hearing Examiner Tom Bowe granted the request. The Board may appoint a permanent hearing examiner or decide to hear the case.
2. **In the matter of the request for hearing of Sunnyside Orchards, Ravalli County, under Mont. Code Ann. § 76-4-126 (BER 2005-15 SUB).** On June 29, the Board received a letter from Cleatus Johnson, a subdivision applicant, appealing the denial of his subdivision application by Ravalli County. By letter dated June 7, 2005, the Ravalli County Environmental Health Department stated that the subdivision application could not be approved because additional information was required to be provided by the applicant. The application was therefore denied pending submittal of the additional information. The Board may appoint a permanent hearing examiner to decide or hear the case.

D. REMANDED CONTESTED CASE

In the matter of the issuance of the Air Quality Permit for the Roundup Power Project, Permit No. 3182-00 (BER 2003-04 AQ). On April 19, 2005, the Montana Supreme Court issued an opinion concluding that the Board, which conducted the contested case hearing on June 4-6, 2003, had not applied the correct standard of review. Additional information was provided in the memorandum with attachments included in the Board packets for the Board meeting on June 3, 2005. The Supreme Court returned the case to the District Court on June 6, 2005. The District Court remanded the case to the Board by Order filed June 15, 2005. Tom Bowe, appointed hearing examiner for administration of the case, issued a scheduling order on June 17, 2005, setting a schedule for the parties to submit their positions concerning the procedure on remand. The Board may decide whether to make a new decision based on the record or to receive additional evidence. The Board may set a schedule for further proceedings.

E. INITIATION OF RULEMAKING

The Department will propose that the Board concur in its recommendation to initiate rulemaking to:

1. Implement House Bill 581, which amends the Clean Air Act of Montana by modifying public comment periods for certain air quality permits and the filing deadline for affidavits

setting forth the grounds for requests for hearing, and by authorizing the Board to issue rules to extend public comment periods. The new legislation was effective on July 1, 2005.

Executive Summary

Notice of Public Hearing on Proposed Amendment

2. Implement Senate Bill 95, which amends the Clean Air Act of Montana to require the Board to adopt rules concerning air quality permit applications and air emission control requirements for certain oil or gas well facilities. The new legislation is effective on January 1, 2006. It is necessary to initiate rulemaking in order to have rules in place by the effective date of the law.

Executive Summary

Notice of Public Hearing on Proposed Amendment and Adoption

F. STANDING INTERIM HEARING EXAMINER

The Board will designate a new standing interim hearing examiner and will reassign all current and new contested cases.

G. MEIC PETITION FOR RULEMAKING

On July 13, 2005, the Board received a petition from the Montana Environmental Information Center and the Fort Belknap Indian Community Council. The petition requests that the Board initiate rulemaking to amend ARM 17.24.116 pertaining to reclamation plans for metal mine permits. Under Mont. Code Ann. Sec. 2-4-315 and Model Rule 2, the Board will hear presentations by the petitioners and other interested persons regarding whether the Board should deny the petition or initiate rulemaking.

Executive Summary

IV. GENERAL PUBLIC COMMENT

Under this item, members of the public may comment on any public matter within the jurisdiction of the Board that is not otherwise on the agenda of the meeting. Individual contested case proceedings are not public matters on which the public may comment.

V. ADJOURNMENT

NOTE: Persons with disabilities who need an accommodation in order to participate in this meeting, should contact the Board Secretary at (406) 444-2544.